

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARTIN J. WALSH, Secretary of Labor,
United States Department of Labor, :

Petitioner, :

v. : Civil Action No. 22-cv-1862

BENJAMIN CORDOBA GANDARA : Motion Date: May 2, 2022
and :

ELTON NASCIMENTO DA SILVA :

Respondents. :

**VERIFIED PETITION FOR EXPEDITED ORDER COMPELLING RESPONDENTS TO
COMPLY WITH ADMINISTRATIVE SUBPOENAS *AD TESTIFICANDUM***

Petitioner MARTIN J. WALSH, Secretary of Labor, United States Department of Labor (“Secretary”), respectfully petitions this Court pursuant to Section 8(b) of the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. § 657(b), to compel Benjamin Cordoba Gandara (“Gandara”) and Elton Nascimento Da Silva (“Da Silva”) (collectively, “Respondents”) to comply with the administrative subpoenas issued on February 24, 2022 (“Subpoenas”), by the Occupational Safety and Health Administration (“OSHA”) in connection with an investigation of BCG Contractor Corporation’s (“BCG”) compliance with the OSH Act. Due to exigent circumstances, described below, the Secretary requests that this Court expedite review of this Petition via Order to Show Cause.

In support of this Petition, as set forth in the Brief in Support of the Secretary’s Petition to Compel Respondent to Comply with Administrative Subpoenas *Ad Testificandum*, the Secretary avers as follows:

JURISDICTION

1. This Petition is brought to require Respondents Gandara and Da Silva to comply with administrative subpoenas *ad testificandum* issued February 24, 2022 (“Subpoenas”) by the Secretary, through the Regional Administrator of OSHA. The Subpoenas were issued in furtherance of OSHA’s ongoing investigation of working conditions at 18 W. Main Street, Bound Brook, NJ.

2. This Court has subject matter jurisdiction over this Petition under Section 8(b) of the OSH Act, 29 U.S.C. § 657(b), which provides that any district court of the United States, within the jurisdiction of which a person resides or transacts business, shall have jurisdiction to issue such a person an order requiring such person to produce evidence in response to an administrative subpoena issued by OSHA. A failure to obey such order may be punished by contempt.

OSHA’S INVESTIGATION OF BCG CONTRACTOR CORP.

3. OSHA is charged with ensuring, so far as possible, safe and healthful working conditions for working men and women by setting and enforcing occupational safety and health standards. In furtherance of its mission, Congress granted OSHA broad authority to conduct investigations and to issue subpoenas in furtherance of investigations.

4. BCG is a contractor located in Bound Brook, NJ which performs construction work throughout New Jersey. OSHA is investigating a fatality that occurred at 17 W. Main Street on November 10, 2021, while BCG employees were performing framing work for a subcontractor, Reifast Construction, Inc. (“Reifast”). Based on the investigation thus far, OSHA believes that Gandara is the owner of BCG and that Da Silva, the foreman/crew leader, determined the rate of pay for the workers and signed the contract with Reifast, on behalf of BCG. Upon information and belief, Da Silva was the only point of contact for both his crew and Reifast, and Reifast gave

Da Silva the paychecks, which were payable to BCG; no one from Reifast has ever seen or spoken with Gandara. BCG is the subject of six open OSHA investigations, three of which are in New Jersey.

5. The OSHA Compliance Safety and Health Officer (“CSHO”) was not able to speak with Da Silva, Gandara, or any other BCG employee on November 10, 2021. On November 15, the CSHO sent an email to BCG’s email address, BCGContractorCorp@hotmail.com, but received no response.

RESPONDENTS’ FAILURE AND REFUSAL TO COMPLY WITH THE SUBPOENA

6. To conduct and conclude this investigation and determine whether to issue a citation, the CSHO attempted to speak with and obtain information from Da Silva. Prior to the issuance of the Subpoenas, the CSHO spoke with Da Silva by phone and email on November 15, 2021, and met with Da Silva in person on November 19, 2021. On November 19, OSHA gave Da Silva a subpoena *duces tecum* for certain documents to be produced by December 29, 2022. Da Silva did not respond to the subpoena. In December 2021, the CSHO left two voicemail messages for Da Silva, but he did not return those calls. On February 17, the CSHO finally spoke with Da Silva, who indicated that he would not cooperate in the investigation. OSHA was never able to obtain a phone number for Gandara and, to date, has never spoken with Gandara.

7. As a result, OSHA issued the Subpoenas to Respondents Gandara and Da Silva on February 24, 2022 (Exhs. A and B), and retained process servers who personally served Gandara and Da Silva with the Subpoenas, on February 25, 2022 and March 1, 2022, respectively (Exhs. C and D).

8. Gandara’s subpoena directed him to appear at the OSHA Avenel Area Office on March 8, 2022 at 10:30am, and Da Silva’s subpoena directed him to appear at the OSHA Avenel

Area Office on March 8, 2022 at 1pm. They were subpoenaed to provide testimony on matters such as: BCG's role at the work site on November 10, 2021; the relationship between BCG and Da Silva; level of interaction between Gandara and Da Silva; the working conditions at the site; and any safety programs or training promulgated by BCG.

9. Both Respondents failed to appear on March 8, 2022, as directed by the Subpoenas. In letters to both Gandara and Da Silva, dated March 11, 2022, OSHA informed each Respondent that his failure to appear violated the subpoena and could result in further court actions, and instructed each of them to contact the CSHO to arrange a date to provide testimony as required by the subpoena. (Exhs. E and F.) The letter to Gandara was delivered by UPS Mail on March 14, 2022, and the letter to Da Silva was delivered by UPS Mail on March 15, 2022. (Exhs. G and H.) Neither Respondent contacted the CSHO, or otherwise sought to arrange another date for testimony.

10. The testimony sought by the Subpoenas is for a legitimate investigatory purpose, and is relevant to this ongoing investigation, as it relates to the working conditions and safety practices at the worksite where the fatality occurred, as well as the respective roles of BCG, Da Silva, and Gandara in that incident. The testimony sought is necessary to complete the investigation to determine whether violations of the OSH Act have occurred, and if so, to whom a citation should issue and how to classify the violations under the OSH Act's citation scheme.

EXIGENCY WARRANTING AN EXPEDITED MOTION CALENDAR

11. OSHA, pursuant to section 9(c) of the OSH Act, 29 U.S.C § 658(c), has six months from the occurrence of the alleged violations to conclude its investigation and, if appropriate, issue any citations and notifications of penalty for any alleged violations of the OSH Act and occupational safety and health standards.

12. In this case, the potential violations occurred on November 10, 2021, so OSHA must conclude its investigation and issue any citation and notification of penalty by no later than May 10, 2022. Given this statute of limitations under the OSH Act, it is necessary for the Secretary to proceed in this action by Order to Show Cause, rather than by notice of motion, to obtain expedited enforcement of the Subpoenas.

13. No prior application to the Court on behalf of the petitioner has been made in this action. There is no other action pending in this matter.

CONCLUSION

14. Respondents disobeyed valid administrative Subpoenas, and their continued evasion of OSHA constitutes an attempt to thwart Secretary's legitimate investigation of an employee's fatality. Despite OSHA's diligence and attempts to obtain Respondents' testimony, they failed to appear as directed by the Subpoenas. As a result of Respondents' conduct, the Secretary has been hindered and delayed in the proper exercise of his lawful authority and responsibility to enforce and administer the OSH Act, has incurred expenses in connection with the prosecution of this matter, and has been damaged to the extent thereof.

PRAYER FOR RELIEF

WHEREFORE, the Secretary of Labor respectfully requests that this Court issue an expedited order (1) compelling Respondents Gandara and Da Silva to fully and completely comply with the Subpoenas *ad testificandum* by immediately appearing to testify; (2) directing Respondents to cease disobedience and resistance to the lawfully issued Subpoenas; (3) requiring Respondents to reimburse the Secretary for the expenses incurred as a result of Respondents' conduct; and (4) granting such other relief as is necessary and appropriate.

DATED: April 1, 2022
New York, New York

SEEMA NANDA
Solicitor of Labor

JEFFREY S. ROGOFF
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LOCAL RULE 11.2 VERIFICATION DECLARATION

Pursuant to Local Civ. R. 11.2, I verify that this matter is not pending in any other court, arbitration, or administrative proceeding. I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of April 2022

/s/ Nicole Lancia
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